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SUPREME COURT, U.S.

No. 82 5028

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

HORACE BUTLER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTIONS PRESENTED

I

Where the state is required to prove the existence of a statutory aggravating circumstance beyond a reasonable doubt as a prerequisite for imposition of the death penalty, are the Eighth and Fourteenth Amendments violated by jury instructions which define the term "reasonable doubt" as "not a fanciful, not a whimsical, but a substantial doubt," as "a substantial doubt for which an honest person seeking the truth can give a real reason," and as "not a weak or slight doubt, but...a serious or strong or substantial well-founded doubt as to the truth of the matters asserted by the state"?

II

Do the Eighth and Fourteenth Amendments require application of the standard of evidentiary sufficiency set forth in Jackson v. Virginia, 443 U.S. 307 (1979), to the evidence of the statutory aggravating circumstance which forms the factual basis of petitioner's sentence of death?

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HORACE BUTLER,

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v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH CAROLINA

Petitioner Horace Butler prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of South Carolina in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported in State v. Butler, ___ S.C. ___, 290 S.E.2d 1 (1982) and is attached hereto as the Appendix to this Petition.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on February 22, 1982. Timely petitions for rehearing and for a stay of execution were denied on April 6, 1982. On May 26, the Chief Justice of the United States extended the time for filing of this petition for writ of certiorari to and including July 6, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having arrested below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the Constitution of the United States, which provides in pertinent

part:

"nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

"No state shall...deprive any person of life, liberty or property without due process of law..."

2. This case also involves the following provisions of the Code of Laws of South Carolina:

S.C. Code §16-3-20. Punishment for murder: spearate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder shall be punished by death or by imprisonment for life and shall not be eligible for parole until the service of twenty years, notwithstanding any other provisions of law. Provided, however, that notwithstanding the provisions of this section, under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition.

(B) Upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If the trial jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant and his counsel shall be permitted to present arguments for or against the sentence of death. The defendant and his counsel shall have the closing argument regarding the sentence imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:
(a) Aggravating circumstances:
(1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with intent to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking, and (h) killing by poison and (i) physical torture;

(2) Murder was committed by a person with a prior record of conviction for murder;
(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;
(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty;
(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;
(7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
(b) Mitigating, circumstances:
(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;
(3) The victim was a participant in the defendant's conduct or consented to the act;
(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;
(5) The defendant acted under duress or under the domination of another person;
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
(7) The age or mentality of the defendant at the time of the crime;
(8) The defendant was provoked by the victim into committing the murder;
(9) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant

found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous.

* * * * *

S.C. Code §16-3-25. Punishment for murder: review by Supreme Court of imposition of death penalty.

(A) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina.

(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

(C) With regard to the sentence, the court shall determine:
(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in §16-3-20, and
(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(D) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(E) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:
(1) Affirm the sentence of death; or
(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined under Item (B) of §16-3-20, the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for such purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any

evidence admitted in the defendant's first trial relating to guilt for the particular crime for which the defendant has been found guilty.

(F) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

STATEMENT OF THE CASE

Petitioner was tried for and convicted of the murder of Pamela Lane. In accordance with South Carolina's capital sentencing statute, S.C. Code §§16-3-20 et seq., which is closely patterned after the Georgia death penalty statute considered by this Court in Gregg v. Georgia, 428 U.S. 153 (1976), a separate sentencing proceeding was conducted before the trial jury at which the state was required to prove beyond a reasonable doubt the existence of at least one statutory aggravating circumstance as a precondition for imposition of the death penalty. The state alleged the existence of two such statutory aggravating circumstances, which were that Miss Lane's murder had been committed while in the commission of rape and kidnapping.

The evidence tended to establish that Miss Lane had left work in the direction of her home late on the night of July 17, 1980. She was riding a Moped motorized bicycle. Tr. 530-5. The route home covered approximately eighteen miles and passed through a remote rural area. Miss Lane's body was found the following day a short distance from the main highway. Tr. 524-5. Petitioner was charged with her murder some weeks later. Tr. 785-7. In the second of two statements which he gave to police, he stated that he had met Miss Lane on her way home, and that she had agreed to accompany him to a secluded area where she had voluntarily engaged in sexual relations with him. He stated that Miss Lane had subsequently told him that she would claim that he had raped her, whereupon he panicked and shot her. Tr. 798-800. Petitioner is black, and Miss Lane was white.

The evidence upon which the state relied at petitioner's sentencing hearing to prove the statutory aggravating circum-

stances of rape and kidnapping was entirely circumstantial, and consisted of the following:

1) The deceased had been shot in the chest, Tr. 595-6, and had received a blow to the head prior to death which was inconsistent with an injury from a fall.

2) Semen was found in the vagina of the deceased. Tr. 598.

3) Petitioner gave a confession to the effect that the deceased engaged in consensual sexual relations with him, that she told him that she was going to accuse him of raping her, and that he thereupon panicked and shot her. Tr. 799.

4) Petitioner and the deceased were apparently strangers to one another prior to the night of this incident.

5) Petitioner was, according to his confession, in possession of a pistol at the time of his encounter with the deceased. Tr. 799.

The evidence also established the following circumstances which did not tend to prove rape:

1) The deceased had no signs of trauma or injury to her external or internal genitalia. Tr. 609.

2) The clothes of the deceased, including her underwear, were in place and showed no evidence of injury other than the bullet wound. Tr. 593-4, 606-7.

3) Petitioner's statement was to the effect that the deceased had consented to have sexual relations with him. Tr. 799.

4) There was no damage to the Moped which the deceased had been riding on the night of her death, or any other indication that the Moped had been pushed or forced off the road.[1]

In considering this evidence after the jury had found petitioner guilty of murder,[2] the trial judge stated that he

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[1] An additional unexplained circumstance was that a Negroid pubic hair which could not have come from petitioner was found on Miss Lane's blouse. Tr. 657.

[2] The state introduced no evidence at petitioner's sentencing hearing, and relied entirely on the evidence previously introduced at the guilt-or-innocence phase of the trial.

was "extremely dubious" as to whether the state had made out a case of either rape or kidnapping sufficient to go to the jury. Tr. 953. The prosecutor conceded that the evidence of kidnapping and rape was entirely circumstantial, but asserted that the alleged unbelievability of petitioner's claim of consent was sufficient, when combined with the autopsy evidence, to establish the aggravating circumstances of rape and kidnapping beyond a reasonable doubt. Tr. 953-5. After a brief recess, the trial judge indicated that he had changed his mind as to the sufficiency of the evidence of rape. Tr. 964-5. Prior to the beginning of petitioner's sentencing hearing, however, the trial judge ruled that the state's evidence of kidnapping was insufficient to establish that circumstance, and that it would therefore not be submitted to the jury. Tr. 972-5.

Having decided to submit to the jury the question of whether rape had been proven beyond a reasonable doubt, the trial judge undertook to instruct the jury as to the meaning of the term "proof beyond a reasonable doubt." In attempting to do so, he instructed the jury as follows:

> ...You are now going to be required to make a determination as to whether the state has proven by the evidence which it has already put in and which is properly before you, and that is what you will make your inquiry relative to, have they proven by that evidence beyond a reasonable doubt every material element of the act of rape. Bear in mind that they must prove the existence of those elements beyond a reasonable doubt and you will recall from my earlier instructions the definition of reasonable doubt, that it is not a fanciful, not a whimsical, but a substantial doubt for which an honest person seeking the truth can give a real reason.

Tr. 1022 (emphasis added). The earlier instructions to which the trial judge alluded had been given two days previously in his guilt phase charge to the jury, and consisted of the following:

> Now, when I use the term "reasonable doubt," it means basically the same thing in the law as it does in everyday English language and that is a doubt for which you have a real reason, not a frivolous doubt, not a whimsical, fanciful doubt, because you can doubt any proposition if you wanted to, but a reasonable doubt is a substantial doubt for which an honest person seeking the truth can give a real reason.

Tr. 940-1 (emphasis added). Finally the trial judge again defined reasonable doubt at the end of his instruction on cir-

cumstantial evidence:

> The two phrases "beyond a reasonable doubt" and "proof to a moral certainty" are basically synonymous and they are the legal equivalent of each other. These phrases, however, connot a degree of proof which is distinguished from an absolute certainty. Proof beyond a reasonable doubt, which the law in its mercy requires for the benefit of the accused, is not a weak or slight doubt, but it is a serious or strong or substantial well-founded doubt as to the truth of the matters asserted by the state.

Tr. 1026-7 (emphasis added). After receiving these instructions, the jury determined that the state had established the statutory aggravating circumstance of rape beyond a reasonable doubt, and sentenced petitioner to death.

On appeal, the South Carolina Supreme Court affirmed the conviction and sentence, rejecting petitioner's challenge to the reasonable doubt instructions. See How the Federal Questions were Raised and Decided Below, infra. The court also dismissed petitioner's claim that the state's evidence of rape was constitutionally insufficient to support the jury's finding and sentence. Although petitioner's argument concerning the sufficiency of the evidence had been based on the standard of review enunciated by this Court in Jackson v. Virginia, 443 U.S. 307 (1979), Brief of Appellant at 38, the state Supreme Court declined to apply the Jackson standard to the evidence of rape, affirming the death sentence instead on the basis that "any evidence direct or circumstantial reasonably tending to prove the guilt of the accused creates a jury issue." State v. Butler, ___ S.C. ___, 290 S.E.2d 1, 4 (1982) (emphasis in original).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Petitioner did not object at his trial to the challenged instructions, which were substantially in accordance with long-settled South Carolina law.[3] On appeal to the South Carolina Supreme Court, petitioner argued that the trial court's definition of reasonable doubt so weakened and diluted that

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[3] South Carolina has no contemporaneous objection rule in capital cases. State v. (James) Butler, ___ S.C. ___, 290 S.E.2d 420 (1982); State v. Adams, ___ S.C. ___, 283 S.E.2d 582 (1981).

legal concept as to have violated the Fourteenth Amendment principle of In re Winship, 397 U.S. 358 (1970). In addition, he argued that these instructions violated the Eighth Amendment by "injecting 'a level of uncertainty and unrealiability into the fact-finding process that cannot be tolerated in a capital case,'" State v. Butler, Brief of Appellant at 48, quoting Beck v. Alabama, 447 U.S. 625 (1980), and pointed out that these instructions came at precisely the point in his trial where "the weakness of the state's case (and the undeniable danger of impermissible racial considerations in the jury's deliberations on the crucial issue of consent) made strict adherence to the reasonable doubt standard most critical." Id. Following submission of the briefs, the South Carolina Supreme Court reaffirmed its approval of the equation of "reasonable doubt" with "strong substantial doubt" in State v. Griffin, ___ S.C. ___, 285 S.E.2d 631, 634 (1981). In the light of State v. Griffin, petitioner sought and was granted leave to argue on Eighth Amendment grounds that Griffin should be modified so as to apply only to non-capital cases. State v. Butler, Petition to Argue for Modification of Precedent, filed November 23, 1981.After hearing oral argument on the question, the Supreme Court of South Carolina affirmed the conviction and death sentence, stating that the reasonable doubt instructions given at trial were "well within the guidelines set by this Court and In re Winship." 290 S.E.2d at 4.

II. After the state anncunced prior to the start of petitioner's sentencing hearing that it would present no additional evidence, petitioner moved for a directed verdict on the grounds that the evidence to support the statutory aggravating circumstances of rape and kidnapping was insufficient tc support a jury finding that either circumstance had been proven beyond a reasonable doubt. In so doing, petitioner cited and relied upon Jackson v. Virginia, 443 U.S. 307 (1979). Tr. 961-2. The trial judge granted the motion as to the kidnapping circumstance, but ultimately denied it as to the rape circumstance.

On appeal to the South Carolina Supreme Court following imposition of a death sentence, petitioner again challenged the sufficiency of the evidence of rape under the Jackson v. Virginia standard, Tr. 1122-3, Exception 10, and argued that application of this standard of review to the sufficiency of the evidence of a statutory aggravating circumstance was mandated by the Eighth Amendment's requirement of special reliability in the determination that death is the appropriate punishment in a particular case. Brief of Appellant at 38. In affirming the death sentence, the Supreme Court of South Carolina rejected petitioner's sufficiency argument on the basis that the trial court was concerned "only with the existence of evidence, not its weight," and that "[a]ny evidence direct or circumstantial reasonably tending to prove the guilt of the accused presents a jury issue." State v. Butler, ___S.C.___, 290 S.E.2d 1, 4 (1982) (emphasis in original). The court's discussion included no reference to Jackson v. Virginia or to the standard of review enunciated in that case, and relied on two pre-Jackson South Carolina cases, State v. Hill, 268 S.C. 390, 234 S.E.2d 219, cert. den. 434 U.S. 870 (1977), and State v. Gunter, 273 S.C. 347, 256 S.E.2d 317 (1979), as authority for its reliance on the "any evidence" standard of review in petitioner's case.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER, IN THIS CAPITAL CASE, THE TRIAL COURT'S DEFINITIONS OF REASONABLE DOUBT SO DILUTED AND WEAKENED THAT PRINCIPLE AS TO HAVE EXCEEDED THE LATITUDE ENJOYED BY STATE COURTS IN INSTRUCTING JURIES CONCERNING FUNDAMENTAL RIGHTS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS.

In In re Winship, this Court established that the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. at 364. It follows from Winship that "[i]n the administration of criminal justice, courts

must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Estelle v. Williams, 425 U.S. 501, 503 (1976). Although Winship and Williams were concerned with the determination of guilt rather than with sentencing, there can be no doubt that their affirmation of the constitutional indispensibility of the reasonable doubt standard applies a fortiori to any factual determination upon which the decision to impose the death penalty is based.[4] Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, J.J.). This case presents the question of whether, in a capital sentencing trial where the state's proof is circumstantial and tenuous, jury instructions which purport to define the reasonable doubt standard can so dilute the effect of that constitutional guarantee as to violate the Eighth and Fourteenth Amendments.

In making this argument, petitioner recognizes the limited function that this Court fulfills in reviewing claims of error in state criminal trial jury instructions such as those at issue here. Cupp v. Naughten, 414 U.S. 141 (1973). His claim is not merely that each of the three separate definitions of reasonable doubt given by the trial judge was "undesirable, erroneous, or even 'universally condemned'." Id. at 146. Rather, he contends that this case presents the relatively rare situation in which the cumulative effect of a whole series of such instructions has been to relieve the prosecution of the burden of proof imposed on it by the Eighth and Fourteenth Amendments to the Constitution of the United States. He also contends that even if these instructions might have passed constitutional scrutiny in a non-capital case, they nevertheless violated the Eighth Amendment by unnecessarily reducing the reliability of the factual determination that petitioner should suffer the punishment of death. Gardner v. Florida, 430 U.S. 349 (1977).

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[4] This conclusion is all the more unavoidable where, as here, the applicable statutory sentencing framework itself requires that any aggravating circumstances relied upon for imposition of the death penalty be established beyond a reasonable doubt. S.C. Code §16-3-20(C) (1976).

In Taylor v. Kentucky, the Court observed that a state trial court's definition of reasonable doubt as "'a substantial doubt, a real doubt'...though perhaps not in itself reversible error, often has been criticized as confusing. [citations omitted]." 436 U.S. 478, 488 (1978). Such criticism had been heard for many years. As the Supreme Court of Tennessee observed in Frazier v. State, 117 Tenn. 430, 100 S.W. 94, 103 (1907), the words "reasonable doubt" convey "their own unmistakable meaning, and...the cumulative effect resulting from the reiteration of the same idea by the use of such words and phrases as 'well-founded doubt', 'substantial doubt', and others of like meaning, is well calculated to fritter away and destroy all benefit to be derived from this important rule of law." Since In re Winship, this view has gained widespread acceptance.[5] The reason for this trend, of course, stems from the plain fact that in modifying the word "doubt," "substantial" (like "strong" or "serious" or "well-founded") simply does not mean the same thing as "reasonable." In considering a recent noncapital case involving only the use of the word "substantial," the Supreme Court of Tennessee put the matter this way:

> We think that there is a significant difference between "reasonable" doubt and "substantial" doubt. The word substantial, according to Webster's New World Dictionary (1961), means "real; actual; true; strong; solid; firm; ample; large; or of substantial value". We think that when consideration is given to the definition and ordinary meaning of this word, there is little doubt but that its use tends to lessen the State's burden and as a natural corollary to increase the burden upon the defendant...

Smith v. State, 547 S.W.2d 925 (1977). A similar point was made somewhat more vividly by Justice Seiler of the Missouri Supreme Court in his concurring opinion in State v. Davis,

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[5] The Fifth, Sixth, Seventh and Eighth Circuits and the United States Court of Military Appeals have held the "substantial doubt" instruction to be error. United States v. Rodriguez, 585 F.2d 1234 (5th Cir. 1978); United States v. Christy, 444 F.2d 448 (6th Cir. 1971), cert.den. 404 U.S. 949; United States v. Wright, 542 F.2d 975 (7th Cir. 1976), cert.den. 429 U.S. 1073; United States v. Atkins, 487 F.2d 257 (8th Cir. 1973); United States v. Cotten, 10 M.J. 260 (CMA 1981). Post-Winship state court decisions rejecting or disapproving the instruction include Laird v. State, 251 Ark. 1074, 476 S.W.2d 811 (1972); State v. Harrison, 149 N.J.Super. 220, 373 A.2d 680 (A.D. 1974); State v. Thorpe, ___ R.I. ___, 429 A.2d 785 (1981); Smith v. State, 547 S.W.2d 925 (Tenn. 1977); State v. McDonald, 89 Wash.2d 190, 571 P.2d 930 (1977). But see United States v. Magnano, 543 F.2d 431 (2d Cir. 1976), cert.den. 429 U.S. 1091; United States v. Smith, 468 F.2d 381 (3d Cir. 1972); Stirpano v. State, 287 A.2d 394 (Del. 1972); State v. Davis, 482 S.W.2d 486 (Mo. 1972).

482 S.W.2d 486, 490 (1972):

> 'Reasonable' and 'substantial' are not synonymous, as can be seen by referring to any of the standard dictionaries. The point was well put by counsel in argument recently where he pointed out that if one had to undergo a serious operation and were querying the doctor as to the prospects for a successful outcome, how differently the person would feel if the doctor told him there was only a reasonable chance of success as opposed to being told that there was a substantial chance of success.

Justice Seiler's hypothetical surgery patient would no doubt have gained even greater comfort from the assurance that his operation's prospects for success, far from being merely "reasonable", had now become not only "substantial" but also "strong" or "well-founded". Not one of these words is in any respect synonomous with the term which they were used to define, and when they were strung end to end, the definition which resulted diluted the reasonable doubt standard far beyond that level of "utmost certainty" upon which the "moral force of the criminal law" depends. In re Winship, 397 U.S. 358, 364 1970).

The prejudicial effect of this definition was exacerbated here by the trial judge's additional instruction that "a reasonable doubt is a substantial doubt for which an honest person seeking the truth can give a real reason." Tr. 1022; and see also Tr. 940-1. Quite apart from its use of the word "substantial," this instruction was improper because it suggested that even if the state's proof has simply not persuaded a juror, his resulting doubt was not "reasonable" unless he was also able to articulate a reason for it. It is for this reason that such instructions have been disapproved by the courts of most jurisdictions which have considered them.[6] The reasoning behind

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[6]Dunn v. Perrin, 570 F.2d 21 (1st Cir. 1978); United States v. Davis, 328 F.2d 864 (2d Cir. 1964); United States v. Harris, 346 F.2d 182 (4th Cir. 1965); Bernstein v. United States, 234 F.2d 475 (5th Cir. 1956); Pettine v. Territory of New Mexico, 201 F. 489 (8th Cir. 1912); State v. Taylor, 76 Idaho 358, 283 P.2d 582 (1955); Sulie v. State, 379 N.E.2d 455 (Ind. 1978); State v. Cohen, 108 Iowa 208, 78 N.W. 857 (1899); State v. Maxwell, 328 A.2d 801 (Me. 1974); Commonwealth v. Robinson, 415 N.E.2d 805 (Mass. 1981); State v. Newman, 93 Minn. 393, 101 N.W. 499 (1904); Isaacks v. State, 337 So.2d 928 (Miss. 1976); State v. Rosenburg, 118 A. 207 (N.J. 1922); Commonwealth v. Custer, 145 Pa.Super. 535, 21 A.2d 524 (1941); Owens v. Commonwealth, 186 Va. 689, 43 S.E.2d 895 (1947); State v. Keffer, 281 S.E.2d 495 (W.Va. 1981); but see State v. Derrico, 181 Conn. 151,

(Footnote continued on next page)

this disapproval was forcefully set out by the Eighth Circuit in Pettine v. Territory of New Mexico, 201 F. 489 (1912):

> The ability to give sound reasons for their doubts or their beliefs is not given to many men, and every prudent and thoughtful man at once recognizes the fact that in the graver and more important affairs of his own life doubts for which he can formulate no convincing reason often induce him to act or to refuse to act. To require every person accused of crime to present such a state of evidence at his trial that every juror can give a sound reason based on the testimony for his doubt of his guilt before he may vote for his acquittal places too heavy a burden on the accused. It destroys the rule of reasonable doubt, and substitutes for a reasonable doubt a demonstrable doubt logically and conclusively sustained by the evidence or the want of it.

201 F. at 496-7.[7]

It is not petitioner's purpose to press upon this Court the question of whether each of these instructions, considered in isolation, should or should not be given in state criminal trials. He does contend, however, that the cumulative effect of the trial judge's repeated attempts to "define" the reasonable doubt standard by diluting the quantum of certainty required to justify a finding for the prosecution was such as to violate the Fourteenth Amendment, and warrants review by this Court. No matter how much latitude the states may enjoy in

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(Footnote 6 continued)

434 A.2d 356 (Conn. 1980); Powers v. State, 150 Ga.App. 25, 256 S.E.2d 637 (1979); State v. Osbey, 213 Kan. 564, 517 P.2d 141 (1973); People v. Turner, 99 Mich.App. 233, 298 N.W.2d 848 (1980).

[7]Similarly, in considering an instruction that a reasonable doubt was one "which one should be able to express a good and substantial reason therefore," the Virginia Supreme Court pointed out that

> [t]he language employed is susceptible of the interpretation that a juror must be able to formulate or express in words the reason for the doubt which may be in his mind before it can be classed as reasonable. A juror may entertain a reasonable doubt as to the guilt of the accused although he may be unable to formulate or express it in words. He may be unconvinced by the evidence and yet unable "to give a good and substantial reason," or, indeed to express any reason for the result of his mental process. If such doubt be honestly entertained the juror should vote for acquittal.

Owens v. Commonwealth, 186 Va. 689, 43 S.E.2d 895, 902 (1947).

the formulation of jury instructions for criminal trials, it is obvious that where the federal Constitution imposes the obligation on a state trial judge to instruct a jury on a particular legal principle, In re Winship, 397 U.S. 358 (1970), Taylor v. Kentucky, 436 U.S. 478 (1978), Carter v. Kentucky, 450 U.S. 288 (1981), the words actually spoken to the jury must fairly convey the substance of the principle involved. There are, in other words, outer limits to the latitude of state courts in devising jury instructions concerning rights guaranteed by the Fourteenth Amendment. So far as petitioner is aware, this Court has never before had occasion to demarcate any such outer limit beyond which an instruction purporting to embody an essential federal constitutional right may not go. Given the still substantial disagreement among American jurisdictions concerning the various definitions of reasonable doubt involved in this case, see notes 5 and 6, supra, petitioner submits that this area is one where the constitutional outer limit of such instructions should now be demarcated by this Court.

This case is an appropriate occasion for such a consideration of the minimum constitutional standards for jury instructions on reasonable doubt, since its facts provide a particularly stark example of the prejudice that can result from the dilution of the reasonable doubt principle. Petitioner was charged at his sentencing hearing with interracial rape, on evidence so tenuous that the trial judge at first announced that he would direct a verdict in petitioner's favor. Among petitioner's defenses to the charge was consent. Thus both the state's evidence and petitioner's defense inevitably forced the jury to confront the question of what sorts of doubts might be classified as "reasonable" doubts. The trial judge answered that question by informing the jury that a reasonable doubt was only such doubt as could also be described as "substantial," "serious," "strong" or "well-founded," and for which the jurors could "give a real reason." Whatever doubts the jury may otherwise have entertained were not likely to survive such an onslaught of explanation, nor did they.

Unlike the merely confusing reasonable doubt instructions criticized in Holland v. United States, 348 U.S. 121, 140 (1954), the instructions given here were indeed "of the type that could mislead the jury into finding no reasonable doubt when in fact there was some." Their effect, in short, was to deny petitioner the full protection of the reasonable doubt standard in the determination that he had committed a crime punishable by death.

II. THE COURT SHOULD GRANT THE WRIT TO CONSIDER THE APPLICABILITY OF JACKSON V. VIRGINIA, 443 U.S. 307 (1979) TO CAPITAL SENTENCING PROCEEDINGS.

As noted above, South Carolina's capital sentencing procedures prohibit imposition of the death penalty except upon a finding by the sentencing authority that at least one statutory aggravating circumstance has been established by proof beyond a reasonable doubt. S.C. Code §16-3-20(c) (1976). Any such holding, moreover, must be reviewed by the Supreme Court of South Carolina in order to ensure that the evidence supports the sentencer's finding of a statutory aggravating circumstance. S.C. Code § 16-3-25(c)(2). This case presents the question of whether the Eighth and Fourteenth Amendments permit the carrying out of a sentence of death imposed on the basis of evidence which was not, and which has never been found to be, sufficient to convince any rational trier of fact beyond a reasonable doubt.

In Jackson v. Virginia, 443 U.S. 307 (1979), the Court observed that the "no evidence" rule of Thompson v. Louisville, 362 U.S. 199 (1960), was "simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt," and held that a habeas corpus petitioner has been denied due process where the evidence upon which his state conviction rests was such that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." 443 U.S. at 320-1, 324. In view of this Court's repeated insistence that the decision to impose death as punishment requires procedures which ensure particular reliability, Woodson v. North Carolina, 428 U.S. 280 (1976), Gardner v. Florida, 430 U.S. 349 (1977),

Beck v. Alabama, 447 U.S. 625 (1980), it cannot seriously be argued that the evidence which forms the factual basis of a particular death sentence need not satisfy the Jackson standard, or that "any evidence" can satisfy the Eighth Amendment's requirement of "a meaningful basis for distinguising the few cases in which [the death penalty] is imposed from the many in which it is not." Furman v. Georgia 408 U.S. 238, 313 (1972) (White, J., concurring).

It is equally clear, however, that the Supreme Court of South Carolina applied precisely such an "any evidence" standard in affirming petitioner's sentence of death. The author of the opinion in petitioner's case, Justice Ness, was acutely aware of the difference between the "any evidence" and Jackson standards of review, since he authored a dissent in an unrelated non-capital murder case just nine days after the issuance of the opinion in State v. Butler which contains the following comparison between the two standards of review:

> Reviewing [the] evidence in the light most favorable to the State as required by the "any" evidence rule, State v. Bailey, 253 S.C. 204, 170 S.E.2d 376 (1969), I am convinced that the record is without "any" evidence to support appellant's conviction.
>
> Moreover, viewing the evidence in accordance with the standard of appellate review mandated by the United States Supreme Court in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed 560 (1979), it is even more convincing the trial judge erred in refusing appellant's motion for a directed verdict. This standard of appellate review requires us to consider not whether there is "any" evidence to support the conviction, but whether viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt.

State v. Stewart, ___S.C.____, ___S.E.2d___ (Opinion No. 21656, filed March 3, 1982) (Ness, J., dissenting). It is plain, then, that the court's reliance in petitioner's case on the pre-Jackson "any evidence" standard in its mandatory appellate review of the sufficiency of the evidence upon which his death sentence rests is the product not of oversight but of an erroneous rejection of the Jackson standard as the appropriate guideline for determining such sufficiency.

A review of the evidence in aggravation in this case, moreover, as summarized above at 6, reveals that petitioner's death sentence could not have withstood scrutiny under the Jackson standard. Regardless of whether the fact that Miss Lane engaged in sexual intercourse and was thereafter murdered might constitute "some evidence" that this sexual intercourse occurred during a rape by petitioner, the record as a whole simply cannot support a finding of rape by a rational trier of fact beyond a reasonable doubt. Accordingly, the constitutionally indispensible factual basis of petitioner's sentence of death simply has not been established with that degree of "utmost certainty" upon which "the moral force of the criminal law depends." In re Winship, 397 U.S. 358, 364 (1970). Even in a non-capital case, such a situation would be constitutionally intolerable. In a capital case such as this one, involving allegations of interracial murder and rape, the added danger that the death penalty may be inflicted on the basis of arbitrary and discriminatory considerations only makes adherence to and application of the strict standard of proof required by Jackson all the more indispensible.

Although the applicability of the Jackson standard to capital sentencing proceedings is implicit in this Court's whole jurisprudence of capital punishment since Furman, the Court has not yet had occasion expressly to apply Jackson in this context. Because the Supreme Court of South Carolina has erroneously rejected Jackson as the standard for review of the sufficiency of the evidence which constitutes the basis for petitioner's death sentence, the Court should grant his petition for a writ of certiorari, apply the legal standard which the Eighth and Fourteenth Amendments require, and vacate his sentence of death.

CONCLUSION

Petitioner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

David I. Bruck

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Attorney at Law

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Columbia, South Carolina 29201
(803) 758-8601

ATTORNEY FOR PETITIONER.

July 6, 1982.

APPENDIX

The STATE, Respondent,

v.

Horace BUTLER, Appellant.

No. 21647.

Supreme Court of South Carolina.

Feb. 22, 1982.

Defendant was convicted before the General Sessions Court of Charleston County, C. Anthony Harris, J., of murder and was sentenced to death, and he appealed. The Supreme Court, Ness, J., held that: (1) juror, who stated that he could return life imprisonment if he thought that was warranted, was properly qualified; (2) there were no actions by victim that constituted legal provocation and thus charge on voluntary manslaughter was not required; (3) required notice was given defendant when he was indicted before the grand jury for murder and his constitutional rights were not violated because indictments failed to specify any statutory aggravating circumstances to be passed on by grand jury prior to actual trial of case; and (4) evidence was sufficient to submit aggravating circumstance of rape to jury.

Affirmed.

1. Jury ⇐108

Juror, who on voir dire stated that he could return life imprisonment if he thought that was warranted, was properly qualified.

2. Criminal Law ⇐376

Where, immediately prior to disputed question whether defendant was "known to carry a gun," same witness testified that defendant was carrying a pistol on night of murder, witness' disputed testimony was merely cumulative since it did no more than bolster fact that witness was aware of pistol on defendant's person, and thus there was no error in admitting testimony on theory that defendant's character had not been put in issue.

3. Criminal Law ⇐517(8)

Where defendant was not provided with copy of statements when they were made due to malfunction of copy machine at police station but was given a copy three weeks later, prior to preliminary hearing and approximately four months before trial, defendant had ample time to prepare his case after receiving copy of confessions and was not prejudiced by failure to provide him with a copy at time statements were made. Code 1976, §§ 8-15-50, 19-1-80, 19-1-90.

4. Homicide ⇐33

Voluntary manslaughter is unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.

5. Homicide ⇐45

Where death is caused by use of deadly weapon, words alone are not sufficient to constitute legal provocation required for voluntary manslaughter.

6. Homicide ⇐309(6)

Since there were no actions by victim that constituted legal provocation, charge on voluntary manslaughter was not required pursuant to request of defendant, who alleged that after victim openly seduced him, redressed herself and calmly informed him that she was going to "cry rape" because she needed an excuse for arriving home late, he "panicked" and shot her.

7. Criminal Law ⇐1208(1)

Statutory death penalty scheme was purposefully designed to withhold matters inadmissible on issue of guilt or innocence from jury until that issue has been determined; this system affords greater protection to accused since imposition of death by public authority is so "profoundly different" from any other sanction. Code 1976, § 16-3-25.

8. Indictment and Information ⇐71.1

Requirement that a defendant receive notice of charges against him does not require that aggravating circumstances be set out in indictment for consideration by

grand jury and thus constitutional notice requirements were met when defendant was indicted before the grand jury for murder and his state constitutional rights were not violated because indictments failed to specify any statutory aggravating circumstances to be passed on by grand jury prior to actual trial of case. Code 1976, §§ 16-3-10 et seq., 16-3-26, 17-19-20; Const.Art. 1, § 11.

9. Criminal Law ⇐741(1)

A trial court is concerned only with existence of evidence, not its weight, and any evidence, direct or circumstantial, reasonably tending to prove guilt of accused creates jury issue.

10. Homicide ⇐354

Evidence was sufficient to submit aggravating circumstance of rape to jury based on trial court's findings that victim received blow to her head prior to death, that defendant was armed with deadly weapon, that semen was present in victim's vaginal area, that semen could have come from male of defendant's blood type, and that victim was killed thereafter.

11. Criminal Law ⇐789(7)

In prosecution for murder, definition of reasonable doubt as "a substantial doubt for which an honest person seeking the truth can give a real reason" and as "not a weak or slight doubt" but a "serious or strong or substantial well-founded doubt as to the truth of the matters asserted by the state" was within acceptable guidelines.

12. Criminal Law ⇐768(3)

Failure to instruct on consequences of hung jury resulted in no possible prejudice where each member of jury was polled and there was no indication of disagreement.

13. Criminal Law ⇐1206(2)

Where record reflected that defendant maliciously and purposefully committed brutal murder accompanied by rape, death penalty was proportionate to crime and defendant. Code 1976, § 16-3-25.

David I. Bruck, of S. C. Commission of Appellate Defense, Columbia, and W. McAlister Hill, Ravenel, for appellant.

Atty. Gen., Daniel R. McLeod, Asst. Atty. Gen., Lindy P. Funkhouser and Senior Asst. Atty. Gen., Brian P. Gibbes, Columbia, and Asst. Sol., Steve Schmutz, Charleston, for respondent.

NESS, Justice:

This is a death penalty case. Butler was convicted for the murder of Pamela Lane and sentenced to death. We affirm.

First Butler asserts certain jurors were wrongfully disqualified from jury duty due to their unwillingness to impose the death penalty. This issue has been decided adversely to appellant and is without merit. *State v. Linder*, S.C., 278 S.E.2d 335 (1981); *State v. Hyman*, S.C., 281 S.E.2d 209 (1981).

[1] Appellant also argues juror Jennings V. Knight should have been disqualified alleging his answers on voir dire indicated he would automatically vote in favor of the death penalty. We disagree. Knight was questioned as follows:

By Defense Counsel:

"Q. Would you automatically send him to death?

"A. Well, according to the evidence what was in the court, what we judged him by." (Tr. 385, f. 18-20).

By the Court:

"Q. Could you return life imprisonment if you thought that was warranted?

"A. Yes." (Tr. 389, f. 5-7).

Considering the entire colloquy with this venireman it is clear that he was properly qualified. *State v. Gilbert & Gleaton*, S.C., 283 S.E.2d 179 (1981). This exception is without merit.

[2] Appellant next argues the trial court erred in admitting testimony that appellant was "known to carry a gun" where appellant's character had not been put in issue. Immediately prior to the disputed question the same witness testified appellant was carrying a pistol on the night of the murder. (Tr. 727, f. 17, to 728, f. 8).

This testimony was merely cumulative since it did no more than bolster the fact that the witness was aware of a pistol on appellant's person. There was no error. *State v. Blackburn*, 271 S.C. 324, 247 S.E.2d 334 (1978).

[3] Appellant asserts the trial court erred in admitting into evidence two written confessions since appellant was not provided with a copy of these statements when made. This was due to a malfunction of the copy machine at the police station. Butler was given a copy three weeks later, prior to the preliminary hearing and approximately four months before trial.

Appellant argues this violated S.C. Code § 8-15-50, § 19-1-80 and § 19-1-90 since a copy was not provided *at the time the statement was made*. We disagree.

South Carolina Code sections shall not be applied in a hypertechnical manner. *State v. Jones*, 228 S.C. 484, 91 S.E.2d 1 (1956). There is nothing in the record to indicate there was any prejudice to appellant's rights. See generally, *State v. Crenshaw, et al.*, 274 S.C. 475, 266 S.E.2d 61 (1980); *State v. Scott*, 269 S.C. 438, 237 S.E.2d 886 (1977). Clearly, appellant had ample time to prepare his case after receiving a copy of the confession. Appellant is due a fair trial, not a perfect one. This exception is without merit.

Appellant contends the trial court erred in refusing to charge manslaughter. He told police on the night of the murder he stopped to talk to the victim and invited her to go for a ride. He stated the victim voluntarily ditched her brand new motorbike in the bushes and got in his car. He then drove to a secluded, wooded area where the deceased openly seduced him, re-dressed herself and calmly informed him that she was going to "cry rape" because she needed an excuse for arriving home late. Appellant said he "panicked" and shot her, then dumped her body over a bridge into a stream.

[4, 5] Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation. *State v. Norris*, 253 S.C. 31, 168 S.E.2d 564 (1969). Where death is caused by the use of a deadly weapon words alone are not sufficient to constitute a legal provocation. *State v. Gardner*, 219 S.C. 97, 64 S.E.2d 130 (1951).

[6] There were no actions by deceased to constitute legal provocation, hence a charge on voluntary manslaughter was not required. This argument has no merit.

Appellant next claims his state constitutional rights were violated because the indictments failed to specify any statutory aggravating circumstances to be passed on by a grand jury prior to the actual trial of the case. We disagree.

[7] "The purpose of the bifurcated trial proceeding is to permit the introduction of evidence at the pre-sentence hearing that normally would be inadmissible at the guilt determination proceeding." *State v. Shaw*, 273 S.C. 194, 208, 255 S.E.2d 799 at 806 (1979). Our statutory death penalty scheme was purposefully designed to withhold matters inadmissible on the issue of guilt or innocence from the jury until that issue has been determined. *State v. Shaw*, supra. Also see *Eberheart v. State*, 232 Ga. 247, 206 S.E.2d 12 (1974). This system affords greater protection to the accused since the imposition of death by public authority is so "profoundly different" from any other sanction. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) as cited in *State v. Shaw*, supra, 255 S.E.2d at 805.

[8] We agree with appellant that fairness and due process of law require that the defendant receive notice of the charges against him sufficient to enable him to prepare his defense. S.C. Code § 17-19-20 (1976); *State v. Hiott*, 276 S.C. 72, 276 S.E.2d 163 (1981); *State v. Tabory*, 262 S.C. 136, 202 S.E.2d 852 (1974). We disagree, however, with the assertion that this notice requires the aggravating circumstances be set out in the indictment for consideration by the grand jury.

The punishment for a crime is not and never has been considered a part of the pleading charging a crime. The indictment

here is for murder, not rape. The statute charging the crime defines murder and provides for notice and due process. S.C. Code, § 16-3-10, et seq. (1976).

Notice is sufficient where the statutory requirements are met. The statute does not require the aggravating circumstance to be included in the indictment. S.C. Code § 16-3-26 (1976). Moreover, appellant concedes he was given sufficient notice.

The required notice referred to by appellant in Article I, § 11 of the S.C. Constitution was met when appellant was indicted before the grand jury for murder. The death sentence he received was for murder, not for the aggravating circumstance, rape. There is no error.

[9] Appellant asserts there was insufficient evidence to submit the aggravating circumstance of rape to the jury. A trial court is concerned only with the existence of evidence, not its weight. *State v. Gunter*, 273 S.C. 347, 256 S.E.2d 317 (1979). And the evidence must be viewed in the light most favorable to the State. *State v. Hill*, 268 S.C. 390, 234 S.E.2d 219 (1977), cert. den., 434 U.S. 870, 98 S.Ct. 211, 54 L.Ed.2d 147 (1977). *Any* evidence direct or circumstantial reasonably tending to prove the guilt of the accused creates a jury issue. *State v. Hill*, supra.

[10] The trial court found: (1) the victim received a blow to her head (serious enough to cause brain damage) prior to death; (2) the appellant was armed with a deadly weapon; (3) the presence of semen in victim's vaginal area; (4) physician's testimony that semen could have come from a male of appellant's blood type, and (5) decedent was thereafter killed. There was sufficient evidence to submit the aggravating circumstance to the jury. This argument has no merit.

Appellant alleges the trial judge erred in instructing the jury on the law of reasonable doubt and in failing to instruct the jury of the consequences of a "hung jury."

[11] Appellant relies on *In The Matter of Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) where the U. S. Supreme Court held that a defendant cannot be found guilty of a criminal offense without establishing his guilt "with utmost certainty." *Id.* 1073. Here the trial judge defined reasonable doubt as ".... a substantial doubt for which an honest person seeking the truth can give a real reason," and as "not a weak or slight doubt, but it is a serious or strong or substantial well-founded doubt as to the truth of the matters asserted by the state." We recently held, "[i]t is not error to equate substantial doubt with reasonable doubt." *State v. Griffin*, S.C., 285 S.E.2d 631 page 633.

These instructions are well within the acceptable guidelines set by this Court and *In re Winship*, supra. There is no error present.

[12] Moreover, each member of the jury was polled and there was no indication of disagreement. The jury's verdict here was unanimous thus no possible prejudice resulted.

Finally, the constitutionality of § 16-3-25(C)(3) has been fully settled by this Court and appellant's exception alleging otherwise is without merit. *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979), cert. den., 444 U.S. 957, 100 S.Ct. 437, 62 L.Ed.2d 329.

[13] We are required under § 16-3-25 to determine whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases. *State v. Shaw & Roach*, 273 S.C. 194, 255 S.E.2d 799 (1979). The record clearly reflects appellant maliciously and purposefully committed a brutal murder accompanied by rape. The death penalty is proportionate to a crime of this nature and to the crime and defendant in this case.

We have carefully reviewed the entire record for any prejudicial error and find none. Appellant's murder conviction and death sentence are affirmed.

AFFIRMED.

LEWIS, C. J., and LITTLEJOHN, GREGORY and HARWELL, JJ., concur.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 82 5028

HORACE BUTLER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Petitioner, Horace Butler, respectfully moves this Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of this Court. The affidavit of petitioner in support of this motion is attached hereto.

Presented herewith is a petition for writ of certiorari of the moving party.

Respectfully submitted,

David I. Bruck

DAVID I. BRUCK
1401 Calhoun Street
Columbia, S. C. 29201
Counsel for Petitioner.

July 6, 1982.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. _____

HORACE BUTLER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF HORACE BUTLER
IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, Horace Butler being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to pre-pay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. _____

1980 - VAN TREE SERVICE
CHARLESTON, SC $3.35 hr

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings account? No

a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Horace Butler
Horace Butler

SWORN TO and subscribed before me
this 4th day of June, 1982.

Arthur M. Butler
Notary Public for South Carolina

My Commission Expires: My Commission Expires May 29, 1982

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. A-866

A-1009

Horace Butler,

Petitioner,

v.

State of South Carolina,

Respondent.

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

To the Honorable Warren E. Burger, Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

The petitioner, Horace Butler, prays that an order be entered extending the time for filing a petition for writ of certiorari to and including July 6, 1982. This application is submitted more than ten days prior to the scheduled filing date for the petition. The pertinent dates are:

February 22, 1982: Petitioner's conviction was affirmed by the Supreme Court of South Carolina.

April 6, 1982: Petitioner's motions for a rehearing and a stay of execution were denied by the Supreme Court of South Carolina.

April 15, 1982: Petitioner's scheduled execution stayed by order of the Chief Justice of the United States, pending disposition of the petition for certiorari.

June 4, 1982: Expiration of time for filing petition for writ of certiorari in this Court, unless extended.

July 6, 1982: Expiration of requested thirty day extension of time for filing a petition in this Court.

The pertinent facts of the case may be stated as follows:

1. Petitioner was sentenced to death in the Charleston County Court of General Sessions on January 26, 1981 upon his conviction for murder, and a subsequent jury finding that he had committed murder while in the commission of rape.

2. The petitioner appealed his case to the South Carolina Supreme Court in which appeal he raised ultimately eleven (11) issues, several of a substantial constitutional nature. The petitioner intends to raise the following federal constitutional claims in his petition for a writ of certiorari:

> (a) that petitioner's rights under the Eighth and Fourteenth Amendments were violated by jury instructions at his sentencing hearing which defined a reasonable doubt as "not a weak or slight doubt, but...a serious, a strong or substantial well-founded doubt as to the truth of the matter asserted by the state," and as "a substantial doubt for which an honest person seeking the truth can give a real reason," and
>
> (b) that petitioner's rights under the Eighth and Fourteenth Amendments were denied by the imposition and affirmance of a sentence of death upon evidence of a statutory aggravating circumstance which was insufficient to convince any rational trier of fact beyond a reasonable doubt, and by the failure of the State Supreme Court to apply the standard enunciated by this Court in Jackson v. Virginia, 443 U.S. 307 (1979), to the sufficiency of such evidence in aggravation during its mandatory review of appellant's sentence of death.

These issues were presented to the South Carolina Supreme Court on direct appeal, and were decided adversely to petitioner. A copy of the Supreme Court's opinion is attached to this application. This Court's jurisdiction under 28 U.S.C. §1257(3) will be invoked.

This extension of time is requested since (1)this is a death penalty case and as such carries the risk of the attendant possible ultimate sanction upon petitioner and is therefore a matter for which counsel needs sufficient time to insure careful and complete attention to the issues to be presented to this Court; (2)the petition for a writ of certiorari will contain substantial federal constitutional issues, as indicated above, which require extensive research and careful drafting and to which counsel cannot do justice unless an extension of time is granted; (3)undersigned counsel is presently sole defense counsel for eight (8) other defendants in death penalty appeals now pending before the South Carolina Supreme Court and faces appeal docket requirements which limit the amount of time currently available to devote to the drafting of the petition for the writ of certiorari, and more specifically that undersigned counsel has a death penalty appellate brief in another case due on May 31, 1982, and further that he is scheduled to present oral argument in another death penalty appeal before the South Carolina Supreme Court on or about June 7, 1982; and (4)unless an extension of time is granted, it is extremely unlikely that the substantial issues involved will be presented in the most clear and concise fashion for the consideration of this Court.

Since petitioner continues to be incarcerated in prison and a stay has been issued by this Court, no prejudice to the State's concerns can result from this requested extension.

WHEREFORE, petitioner respectfully requests an order extending the time for filing his petition for a writ of certiorari to and including July 6, 1982.

Respectfully submitted,

David I. Bruck

DAVID I. BRUCK
Attorney for Petitioner

1401 Calhoun Street
Columbia, S. C. 29201
(803)758-8601

This 21st day of May, 1982.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

Horace Butler, ... Appellant.

Appeal From Charleston County
C. Anthony Harris, Judge

Opinion No. 21647
Filed February 22, 1982

AFFIRMED

David I. Bruck, of S. C. Commission of Appellate Defense, of Columbia; and W. McAlister Hill, of Ravenel, for appellant.

Attorney General Daniel R. McLeod, Assistant Attorney General Lindy P. Funkhouser and Senior Assistant Attorney General Brian P. Gibbes, all of Columbia; and Assistant Solicitor Steve Schmutz, of Charleston, for respondent.

NESS, A. J.: This is a death penalty case. Butler was convicted for the murder of Pamela Lane and sentenced to death. We affirm.

First Butler asserts certain jurors were wrongfully disqualified from jury duty due to their unwillingness to impose the death penalty. This issue has been decided adversely to appellant and is without merit. State v. Linder, ___ S. C. ___, 278 S. E. 2d 335 (1981); State v. Hyman, ___ S. C. ___, 281 S. E. 2d 209 (1981).

Appellant also argues juror Jennings V. Knight should have been disqualified alleging his answers on voir dire indicated he would automatically vote in favor of the death penalty. We disagree. Knight was questioned as follows:

By Defense Counsel:

"Q. Would you automatically send him to death?

"A. Well, according to the evidence what was in the court, what we judged him by." (Tr. 385, f. 18-20).

By the Court:

"Q. Could you return life imprisonment if you thought that was warranted?

"A. Yes." (Tr. 389, f. 5-7).

Considering the entire colloquy with this venireman it is clear that he was properly qualified. State v. Gilbert & Gleaton, ___ S. C. ___, 283 S. E. 2d 179 (1981). This exception is without merit.

Appellant next argues the trial court erred in admitting testimony that appellant was "known to carry a gun" where appellant's character had not been put in issue. Immediately prior to the disputed question the same witness testified appellant was carrying a pistol on the night of the murder. (Tr. 727, f. 17, to 728, f. 8). This testimony was merely cumulative since it did no more than bolster the fact that the witness was aware of a pistol on appellant's person. There was no error. State v. Blackburn, 271 S. C. 324, 247 S. E. 2d 334 (1978).

Appellant asserts the trial court erred in admitting into evidence two written confessions since appellant was not provided with a copy of these statements when made. This was due to a malfunction of the copy machine at the police station. Butler was given a copy three weeks later, prior to the preliminary hearing and approximately four months before trial.

Appellant argues this violated S. C. Code §8-15-50, §19-1-80 and §19-1-90 since a copy was not provided at the time the statement was made. We disagree.

South Carolina Code sections shall not be applied in a hypertechnical manner. State v. Jones, 228 S. C. 484, 91 S. E. 2d 1 (1956). There is nothing in the record to indicate there was any prejudice to appellant's rights. See generally, State v. Crenshaw, et al., 274 S. C. 475, 266 S. E. 2d 61 (1980); State v. Scott, 269 S. C. 438, 237 S. E. 2d 886 (1977). Clearly, appellant had ample time to prepare his case after receiving a copy of the confession. Appellant is due a fair trial, not a perfect one. This exception is without merit.

Appellant contends the trial court erred in refusing to charge manslaughter. He told police on the night of the murder he stopped to talk to the victim and invited her to go for a ride. He stated the victim voluntarily ditched her brand new motorbike in the bushes and got in his car. He then drove to a secluded, wooded area where the deceased openly seduced him, re-dressed herself and calmly informed him that she was going to "cry rape" because she needed an excuse for arriving home late. Appellant said he "panicked" and shot her, then dumped her body over a bridge into a stream.

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation. State v. Norris, 253 S. C. 31, 168 S. E. 2d 564 (1969). Where death is caused by the use of a deadly weapon words alone are not sufficient to constitute a legal provocation. State v. Gardner, 219 S. C. 97, 64 S. E. 2d 130 (1951).

There were no actions by deceased to constitute legal provocation, hence a charge on voluntary manslaughter was not required. This argument has no merit.

Appellant next claims his state constitutional rights were violated because the indictments failed to specify any statutory aggravating circumstances to be passed on by a grand jury prior to the actual trial of the case. We disagree.

"The purpose of the bifurcated trial proceeding is to permit the introduction of evidence at the pre-sentence hearing that normally would be inadmissible at the guilt determination proceeding." State v. Shaw, 273 S. C. 194, 208, 255 S. E. 2d 799 at 806 (1979). Our statutory death penalty scheme was purposefully designed to withhold matters inadmissible on the issue of guilt or innocence from the jury until that issue has been determined. State v. Shaw, supra. Also see Eberheart v. State, 206 S. E. 2d 12 (Ga. 1974). This system affords greater protection to the accused since the imposition of death by public authority is so "profoundly different" from any other sanction. Lockett v. Ohio, 438 U. S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) as cited in State v. Shaw, supra, 255 S. E. 2d at 805.

We agree with appellant that fairness and due process of law require that the defendant receive notice of the charges against him sufficient to enable him to prepare his defense. S. C. Code §17-19-20 (1976); State v. Hiott, 276 S. C. 72, 276 S. E. 2d 163 (1981); State v. Tabory, 262 S. C. 136, 202 S. E. 2d 852 (1974). We disagree, however, with the assertion that this notice requires the aggravating circumstances be set out in the indictment for consideration by the grand jury.

The punishment for a crime is not and never has been considered a part of the pleading charging a crime. The indictment here is for murder, not rape. The statute charging the crime defines murder and provides for notice and due process. S. C. Code, §16-3-10, et seq. (1976).

Notice is sufficient where the statutory requirements are met. The statute does not require the aggravating circumstance to be included in the indictment. S. C. Code §16-3-26 (1976). Moreover, appellant concedes he was given sufficient notice.

The required notice referred to by appellant in Article I, §11 of the S. C. Constitution was met when appellant was indicted before the grand jury for murder. The death sentence he received was for murder, not for the aggravating circumstance. Rape. There is no error.

Appellant asserts there was insufficient evidence to submit the aggravating circumstance of rape to the jury. A trial court is concerned only with the existence of evidence, not its weight. State v. Gunter, 273 S. C. 347, 256 S. E. 2d 317 (1979). And the evidence must be viewed in the light most favorable to the State. State v. Hill, 268 S. C. 390, 234 S. E. 2d 219 (1977), cert. den., 434 U. S. 870, 98 S. Ct. 211, 54 L. Ed. 2d 147 (1977). Any evidence direct or circumstantial reasonably tending to prove the guilt of the accused creates a jury issue. State v. Hill, supra.

The trial court found: (1) the victim received a blow to her head (serious enough to cause brain damage) prior to death; (2) the appellant was armed with a deadly weapon; (3) the presence of semen in victim's vaginal area; (4) physician's testimony that semen could have come from a male of appellant's blood type, and (5) decedent was thereafter killed. There was sufficient evidence to submit the aggravating circumstance to the jury. This argument has no merit.

Appellant alleges the trial judge erred in instructing the jury on the law of reasonable doubt and in failing to instruct the jury of the consequences of a "hung jury."

Appellant relies on In The Matter of Winship, 397 U. S. 358, 90 S. Ct. 1068 (1970) where the U. S. Supreme Court held that a defendant cannot be found guilty of a criminal offense without establishing his guilt "with utmost certainty." Id. 1073. Here the trial judge defined reasonable doubt as "....a substantial doubt for which an honest person seeking the truth can give a real reason," and as "not a weak or slight doubt, but it is a serious or strong or substantial well-founded doubt as to the truth of the matters asserted by the state." We recently held, "[i]t is not error to equate substantial doubt with reasonable doubt." State v. Griffin, Op. No. 21600, Smith's 11/24/81, page 13.

These instructions are well within the acceptable guidelines set by this Court and In Re Winship, supra. There is no error present.

Moreover, each member of the jury was polled and there was no indication of disagreement. The jury's verdict here was unanimous thus no possible prejudice resulted.

Finally, the constitutionality of §16-3-25(c)(3) has been fully settled by this Court and appellant's exception alleging otherwise is without merit. State v. Shaw, 273 S. C. 194, 255 S. E. 2d 799 (1979), cert. den., 444 U. S. 957, 100 S. Ct. 437, 62 L. Ed. 2d 329.

We are required under §16-3-25 to determine whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases. State v. Shaw & Roach, 273 S. C. 194, 255 S. E. 2d 799 (1979). The record clearly reflects appellant maliciously and purposefully committed a brutal murder accompanied by rape. The death penalty is proportionate to a crime of this nature and to the crime and defendant in this case.

We have carefully reviewed the entire record for any prejudicial error and find none. Appellant's murder conviction and death sentence are affirmed.

AFFIRMED.

LEWIS, C.J., LITTLEJOHN, GREGORY and HARWELL, JJ., concur.

The Supreme Court of South Carolina

FRANCES H. SMITH
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

April 6, 1982

David I. Bruck, Esquire
S. C. Commission of Appellate Defense
1401 Calhoun Street
Columbia, South Carolina 29201

Re: The State v. Horace Butler

Dear Mr. Bruck:

The Court has this day refused your Petition for Rehearing and Petition for Stay of Execution in the following order:

"Petition Denied.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ J. B. Ness A.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J.

April 6, 1982"

The remittitur is being sent down today.

Very truly yours,

Frances H. Smith
CLERK

FHS/cm

cc: The Honorable Brian P. Gibbes

APPENDIX B

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. A-866

Horace Butler,

Petitioner,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 1982, three copies of Petitioner's Application for Extension of Time in which to File Petition for Writ of Certiorari were mailed, postage prepaid, to the below named counsel for the Respondent. I further certify that all parties required to be served have been so served.

Brian P. Gibbes
Office of the Attorney General
State of South Carolina
P. O. Box 11549
Columbia, South Carolina 29211

David I. Bruck

DAVID I. BRUCK

Counsel for Petitioner

1401 Calhoun Street
Columbia, S. C. 29201
(803) 758-8601

David I. Bruck
Attorney at Law
1401 Calhoun Street
Columbia, South Carolina 29201
803 / 758-8601

May 21, 1982

RECEIVED
MAY 24 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

A-1009

Honorable Alexander L. Stevas
Clerk
Supreme Court of the United States
Washington, D. C. 20543

RE: Butler v. South Carolina
A-866

Dear Sir:

Please find enclosed an original and one copy, with proof of service, of an Application for Extension of Time in Which to File Petition for Writ of Certiorari addressed to the Chief Justice as Circuit Justice.

Sincerely,

David I. Bruck

David I. Bruck
Attorney for petitioner

DIB/br

Enclosures

cc: Brian P. Gibbes
Office of the Attorney General
State of South Carolina

Supreme Court of the United States

No. A-866

Horace Butler,

Petitioner,

v.

South Carolina

O R D E R

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the execution and enforcement of the sentence of death imposed upon the petitioner and scheduled for April 30, 1982, be, and the same is hereby, stayed pending the timely filing and disposition by this Court of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

Chief Justice of the United States

Dated this 15th day of April, 1982

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO.

RECEIVED
APR 13 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Horace Butler,

Petitioner,

v.

A-866

The State of South Carolina,

Respondent.

APPLICATION FOR STAY OF EXECUTION

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States and Circuit Justice for the Fourth Circuit:

Petitioner Horace Butler prays that an Order be entered, pursuant to 28 U.S.C. Section 2101(f), staying the execution of his death sentence, scheduled for April 30, 1982, pending a final disposition in this Court of his petition for a writ of certiorari. In support of this application, Petitioner respectfully shows:

1. Petitioner was convicted of murder, and was sentneced to death by a jury in the Charleston County court of general sessions on January 26, 1981.

2. Both the conviction and death sentence were affirmed by the Supreme Court of South Carolina on February 22, 1982, in an as yet unreported opinion which is annexed hereto as Appendix A.

3. Petitioner's timely requests for rehearing and for stay of execution pending final disposition of a petition for writ of certiorari in this Court were denied by the Supreme Court of South Carolina by order of April 6, 1982, annexed hereto as Appendix B.

4. On April 7, 1982, the Supreme Court of South Carolina

instructed the Clerk of that court to order the Commissioner of the State Department of Corrections to carry out the death sentence upon Petitioner on the fourth Friday after receipt of such order, as required by S.C. Code §17-25-370 (1976). A copy of these orders are annexed hereto as Appendix C and D.

5. Petitioner will therefore be executed on April 30, 1982, unless a stay of execution is granted by this Court.

6. Among the substantial constitutional claims of which Petitioner intends to seek review by this Court are the following:

(a) Petitioner's rights under the Eighth and Fourteenth Amendments were violated by jury instructions at his sentencing hearing which defined a reasonable doubt as "not a weak or slight doubt, but. . .a serious a strong or substantial well-founded doubt as to the truth of the matter asserted by the state," and as "a substantial doubt for which an honest person seeking the truth can give a real reason."

(b) Petitioners' rights under the Eighth and Fourteenth Amendments were denied by the imposition and affirmance of a sentence of death upon evidence of a statutory aggravating circumstance which was insufficient to convince any rational trier of fact beyond a reasonable doubt, and by the failure of the state Supreme Court to apply the standard enunciated by this Court in Jackson v. Virginia, 443 U.S. 307 (1979), to the sufficiency of such evidence in aggravation during its mandatory review of appellant's sentence of death.

7. Petitioner is presently in the custody of the Warden of the Central Correctional Institution, South Carolina Department of Corrections, Columbia, South Carolina. A stay of execution would neither prejudice the State of South Carolina nor interfere with Petitioner's custodial status, but is necessary to assure that Petitioner is not executed before this Court can consider and determine the issues to be raised in his petition for a writ of certiorari.

WHEREFORE, Petitioner respectfully requests an order staying his execution pending further order of this Court.

Respectfully submitted,

David I. Bruck

DAVID I. BRUCK
Counsel for Petitioner

April 9, 1982.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

Horace Butler, ... Appellant.

Appeal From Charleston County
C. Anthony Harris, Judge

Opinion No. 21647
Filed February 22, 1982

AFFIRMED

David I. Bruck, of S. C. Commission of Appellate Defense, of Columbia; and W. McAlister Hill, of Ravenel, for appellant.

Attorney General Daniel R. McLeod, Assistant Attorney General Lindy P. Funkhouser and Senior Assistant Attorney General Brian P. Gibbes, all of Columbia; and Assistant Solicitor Steve Schmutz, of Charleston, for respondent.

NESS, A. J.: This is a death penalty case. Butler was convicted for the murder of Pamela Lane and sentenced to death. We affirm.

First Butler asserts certain jurors were wrongfully disqualified from jury duty due to their unwillingness to impose the death penalty. This issue has been decided adversely to appellant and is without merit. State v. Linder, ___ S. C. ___, 278 S. E. 2d 335 (1981); State v. Hyman, ___ S. C. ___, 281 S. E. 2d 209 (1981).

Appellant also argues juror Jennings V. Knight should have been disqualified alleging his answers on voir dire indicated he would automatically vote in favor of the death penalty. We disagree. Knight was questioned as follows:

By Defense Counsel:

"Q. Would you automatically send him to death?

"A. Well, according to the evidence what was in the court, what we judged him by." (Tr. 385, f. 18-20).

By the Court:

"Q. Could you return life imprisonment if you thought that was warranted?

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Considering the entire colloquy with this venireman it is clear that he was not properly qualified. State v. Gilbert & Gleaton, ___ S. C. ___, 283 S. E. 2d 179 (1981). This exception is without merit.

Appellant next argues the trial court erred in admitting testimony that appellant was "known to carry a gun" where appellant's character had not been put in issue. Immediately prior to the disputed question the same witness testified appellant was carrying a pistol on the night of the murder. (Tr. 727, f. 17, to 728, f. 8). The testimony was merely cumulative since it did no more than bolster the fact that the jury was aware of a pistol on appellant's person. There was no error. State v. Blackburn, 271 S. C. 324, 247 S. E. 2d 334 (1978).

APPENDIX A

Appellant asserts the trial court erred in admitting into evidence two written confessions since appellant was not provided with a copy of these statements when made. This was due to a malfunction of the copy machine at the police station. Butler was given a copy three weeks later, prior to the preliminary hearing and approximately four months before trial.

Appellant argues this violated S. C. Code §8-15-50, §19-1-30 and §19-1-90 since a copy was not provided at the time the statement was made. We disagree.

South Carolina Code sections shall not be applied in a hypertechnical manner. State v. Jones, 228 S. C. 484, 91 S. E. 2d 1 (1956). There is nothing in the record to indicate there was any prejudice to appellant's rights. See generally, State v. Crenshaw, et al., 274 S. C. 475, 266 S. E. 2d 61 (1980); State v. Scott, 269 S. C. 438, 237 S. E. 2d 886 (1977). Clearly, appellant had ample time to prepare his case after receiving a copy of the confession. Appellant is due a fair trial, not a perfect one. This exception is without merit.

Appellant contends the trial court erred in refusing to charge manslaughter. He told police on the night of the murder he stopped to talk to the victim and invited her to go for a ride. He stated the victim voluntarily ditched her brand new motorbike in the bushes and got in his car. He then drove to a secluded, wooded area where the deceased openly seduced him, re-dressed herself and calmly informed him that she was going to "cry rape" because she needed an excuse for arriving home late. Appellant said he "panicked" and shot her, then dumped her body over a bridge into a stream.

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation. State v. Norris, 253 S. C. 31, 168 S. E. 2d 564 (1969). Where death is caused by the use of a deadly weapon words alone are not sufficient to constitute a legal provocation. State v. Gardner, 219 S. C. 97, 64 S. E. 2d 130 (1951).

There were no actions by deceased to constitute legal provocation, hence a charge on voluntary manslaughter was not required. This argument has no merit.

Appellant next claims his state constitutional rights were violated because the indictments failed to specify any statutory aggravating circumstances to be passed on by a grand jury prior to the actual trial of the case. We disagree.

"The purpose of the bifurcated trial proceeding is to permit the introduction of evidence at the pre-sentence hearing that normally would be inadmissible at the guilt determination proceeding." State v. Shaw, 273 S. C. 194, 208, 255 S. E. 2d 799 at 806 (1979). Our statutory death penalty scheme was purposefully designed to withhold matters inadmissible on the issue of guilt or innocence from the jury until that issue has been determined. State v. Shaw, supra. Also see Eberheart v. State, 206 S. E. 2d 12 (Ga. 1974). This system affords greater protection to the accused since the imposition of death by public authority is so "profoundly different" from any other sanction. Lockett v. Ohio, 438 U. S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) as cited in State v. Shaw, supra, 255 S. E. 2d at 805.

We agree with appellant that fairness and due process of law require that the defendant receive notice of the charges against him sufficient to enable him to prepare his defense. S. C. Code §17-19-20 (1976); State v. Hiott, 276 S. C. 72, 276 S. E. 2d 163 (1981); State v. Tabory, 262 S. C. 136, 202 S. E. 2d 632 (1974). We disagree, however, with the assertion that this notice requires the aggravating circumstances be set out in the indictment for consideration by the grand jury.

The punishment for a crime is not and never has been considered a part of the pleading charging a crime. The indictment here is for murder, not rape. The statute charging the crime defines murder and provides for notice and due process. S. C. Code, §16-3-10, et seq. (1976).

Notice is sufficient where the statutory requirements are met. The statute does not require the aggravating circumstance to be included in the indictment. S. C. Code §16-3-26 (1976). Moreover, appellant concedes he was given sufficient notice.

The required notice referred to by appellant in Article I, §11 of the S. C. Constitution was met when appellant was indicted before the grand jury for murder. The death sentence he received was for murder, not for the aggravating circumstance, rape. There is no error.

Appellant asserts there was insufficient evidence to submit the aggravating circumstance of rape to the jury. A trial court is concerned only with the existence of evidence, not its weight. State v. Gunter, 273 S. C. 347, 256 S. E. 2d 317 (1979). And the evidence must be viewed in the light most favorable to the State. State v. Hill, 268 S. C. 390, 234 S. E. 2d 219 (1977), cert. den., 434 U. S. 870, 98 S. Ct. 211, 54 L. Ed. 2d 147 (1977). Any evidence direct or circumstantial reasonably tending to prove the guilt of the accused creates a jury issue. State v. Hill, supra.

The trial court found: (1) the victim received a blow to her head (serious enough to cause brain damage) prior to death; (2) the appellant was armed with a deadly weapon; (3) the presence of semen in victim's vaginal area; (4) physician's testimony that semen could have come from a male of appellant's blood type, and (5) decedent was thereafter killed. There was sufficient evidence to submit the aggravating circumstance to the jury. This argument has no merit.

Appellant alleges the trial judge erred in instructing the jury on the law of reasonable doubt and in failing to instruct the jury of the consequences of a "hung jury."

Appellant relies on In The Matter of Winship, 397 U. S. 358, 90 S. Ct. 1068 (1970) where the U. S. Supreme Court held that a defendant cannot be found guilty of a criminal offense without establishing his guilt "with utmost certainty." Id. 1073. Here the trial judge defined reasonable doubt as "....a substantial doubt for which an honest person seeking the truth can give a real reason," and as "not a weak or slight doubt, but it is a serious or strong or substantial well-founded doubt as to the truth of the matters asserted by the state." We recently held, "[i]t is not error to equate substantial doubt with reasonable doubt." State v. Griffin, Op. No. 21600, Smith's 11/24/81, page 13.

These instructions are well within the acceptable guidelines set by this Court and In Re Winship, supra. There is no error present.

Moreover, each member of the jury was polled and there was no indication of disagreement. The jury's verdict here was unanimous thus no possible prejudice resulted.

Finally, the constitutionality of §16-3-25(c)(3) has been fully settled by this Court and appellant's exception alleging otherwise is without merit. State v. Shaw, 273 S. C. 194, 255 S. E. 2d 799 (1979), cert. den., 444 U. S. 957, 100 S. Ct. 437, 62 L. Ed. 2d 329.

We are required under §16-3-25 to determine whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases. State v. Shaw & Roach, 273 S. C. 194, 255 S. E. 2d 799 (1979). The record clearly reflects appellant maliciously and purposefully committed a brutal murder accompanied by rape. The death penalty is proportionate to a crime of this nature and to the crime and defendant in this case.

We have carefully reviewed the entire record for any prejudicial error and find none. Appellant's murder conviction and death sentence are affirmed.

AFFIRMED.

LEWIS, C.J., LITTLEJOHN, GREGORY and HARWELL, JJ., concur.

The Supreme Court of South Carolina

FRANCES H. SMITH
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

April 6, 1982

David I. Bruck, Esquire
S. C. Commission of Appellate Defense
1401 Calhoun Street
Columbia, South Carolina 29201

Re: The State v. Horace Butler

Dear Mr. Bruck:

The Court has this day refused your Petition for Rehearing and Petition for Stay of Execution in the following order:

"Petition Denied.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ J. B. Ness A.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J.

April 6, 1982"

The remittitur is being sent down today.

Very truly yours,

Frances H. Smith
CLERK

FHS/cm

cc: The Honorable Brian P. Gibbes

APPENDIX B

The Supreme Court of South Carolina

Appeal from Charleston County

The State,

Respondent,

v.

Horace Butler,

Appellant.

ORDER

The appellant, Horace Butler, was convicted of murder in the Court of General Sessions for Charleston County and sentenced to death by electrocution. On appeal to this Court, the conviction and sentence were affirmed in Opinion No. 21647, filed on February 22, 1982. Petition for Rehearing and Petition for Stay of Execution were filed on March 3, 1982. These Petitions were denied by this Court on April 6, 1982.

The remittitur in this case has been sent down to the Clerk of the Court of General Sessions for Charleston County, and the Clerk of this Court is directed to proceed under the terms of Section 17-25-370 of the 1976 Code.

C.J.

A.J.

A.J.

A.J.

Columbia, South Carolina

April 7, 1982.

CERTIFIED TRUE COPY.

Deputy Clerk, S. C. Supreme Court

APPENDIX C

The Supreme Court of South Carolina

Appeal From Charleston County

The State,

Respondent,

v.

Horace Butler,

Appellant.

ORDER

TO THE HONORABLE WILLIAM D. LEEKE, COMMISSIONER, STATE DEPARTMENT OF CORRECTIONS:

This is to notify you that the sentence of death imposed in the case of The State v. Horace Butler was affirmed by this Court in Opinion No. 21647, filed on February 22, 1982.

Petition for Rehearing and Petition for Stay of Execution were filed in this Court on March 3, 1982. These Petitions were denied by the Court on April 6, 1982, and the remittitur has been sent down to the Clerk of the Court of General Sessions for Charleston County.

IT IS, THEREFORE, required of you by Section 17-25-370 of the Code of Laws of South Carolina, 1976, entitled: "Execution of Death Sentence Upon Affirmance of Judgment or Dismissal or Abandonment of Appeal" to execute the judgment and sentence of death imposed on the said appellant, Horace Butler, on the fourth Friday after the service upon you or receipt of this notice.

Let a copy of this notice be served immediately upon the appellant, Horace Butler.

Frances N. Smith
CLERK

Columbia, South Carolina

April 7, 1982.

CERTIFIED TRUE COPY.
Rebecca D. Mims
Deputy Clerk, S. C. Supreme Court

APPENDIX D

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.

Horace Butler,

Petitioner,

v.

State of South carolina,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on ths 9th day of April, 1982, three copies of Petitioner's Application for a Stay of Execution were mailed, postage prepaid, to the below named counsel for the Respondent. I further certify that all parties required to be served have been so served.

Brian P. Gibbes
Office of the Attorney General
State of South Carolina
P. O. Box 11549
Columbia, South Carolina 29211

David I. Bruck

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Counsel for Petitioner

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82-5028

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. [redacted]

RECEIVED
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SUPREME COURT, U.S.

HORACE BUTLER, Petitioner,

versus

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL R. McLEOD
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

BRIAN P. GIBBES
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211

ATTORNEYS FOR RESPONDENT.

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT A TRUE COPY OF Brief in Opposition HAS BEEN SERVED UPON OPPOSING COUNSEL BY MAILING 1 COPIES IN AN ENVELOPE PROPERLY ADDRESSED WITH POSTAGE PREPAID THIS 4th DAY OF August, 1982

Brian P. Gibbes
ATTORNEY FOR Respondent

SWORN TO BEFORE ME THIS 4th DAY OF August, 1982

Karen Y. Newton
Notary Public for South Carolina
My Commission Expires 9-17-87

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.

HORACE BUTLER, Petitioner,

versus

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in State v. Butler, ___ S.C. ___, 290 S.E. 2d 1 (1982), as reproduced in Petitioner's Appendix A at pages 1-4.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I.

Did the trial court properly instruct the jury as to reasonable doubt?

II.

Has the South Carolina Supreme Court fully complied with the standards of review set down by this Court in Jackson v. Virginia?

ARGUMENT

I.

The trial court properly instructed the jury as to reasonable doubt.

Petitioner requests this Court to overturn his death sentence by declaring as reversible error the trial court's instructions on reasonable doubt. There is no dispute that these instructions were based upon clear decisions of the South Carolina Supreme Court and decades of practice which have solidified the instructions upon reasonable doubt given by the trial court as a mainstay of jury instructions in every criminal case. Petitioner not only asks this Court to reject these well settled prior decisions, but to also reverse his conviction based upon instructions which were undisputably proper under the decisions of the South Carolina Supreme Court.

Respondent respectfully submits that Petitioner's effort for new trial on this ground must fail.

Petitioner begins his discussion by citing In Re Winship, 397 U.S. 358 (1970), for the proposition that this Court is forced to reverse his death sentence in the instant case, because the reasonable doubt standard has now been raised to a constitutional level. Respondent respectfully submits that Winship, rather, stands for the proposition that the reasonable doubt standard has always been one of the most basic constitutional guarantees granted to a defendant in a criminal case. Winship, while re-emphasizing such, in no way changes this; nor does it reflect any differently upon

the prior decisions of the South Carolina Supreme Court now challenged by Petitioner through its citation. In effect, Respondent contends that the South Carolina Supreme Court has always fully recognized the constitutional dimensions of the reasonable doubt standard in its decisions that the language utilized by the trial court in the instant case was proper. State v. Griffin, ___ S.C. ___, 285 S.E. 2d 631, 633; State v. Starnes, 213 S.C. 304, 49 S.E. 2d 209, 214 (1948); State v. Senn, 32 S.C. 393, 11 S.E. 292 (1890); State v. Coleman, 240 S.C. 441 (1883).

Furthermore, even though Petitioner correctly cites several decisions of State and Federal courts enunciating disapproval of equating reasonable doubt with, for example, a substantial doubt; the same decisions have almost universally held that, particularly in absence of binding precedent that such instructions are improper, they do not result in reversible error in and of themselves. This contention was upheld most recently by this Court in Taylor v. Kentucky, 436 U.S. 478, 488, 56 L. Ed. 2d 468, 98 S. Ct. 1930 (1978).

Respondent respectfully submits that Petitioner has not demonstrated to this Court that the challenged jury instruction was improper or that, more importantly, the jury verdict was compromised as a result. The disputed instructions were well within the acceptable guidelines set down by this Court and, at any rate, do not justify reversal of Appellant's death sentence.

II.

The South Carolina Supreme Court has fully complied with the standards of review set down by this Court in Jackson v. Virginia.

Petitioner contends that the South Carolina Supreme Court has erroneously rejected the standard of review set down by this Court in Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); alleging that the standard of review applied in the instant case was inconsistent with that required by this Court in Jackson. Respondent respectfully submits that the standard of review utilized by the South Carolina Supreme Court in the instant case was entirely consistent with the requirements set down by this Court in Jackson and Petitioner's contention alleging otherwise is patently without merit.

Indicative of this is the precise language utilized by the South Carolina Supreme Court in its decision here:

> Appellant asserts there was insufficient evidence to submit the aggravating circumstance of rape to the jury. A trial court is concerned only with the existence of evidence, not its weight. State v. Gunter, 273 S.C. 347, 256 S.E. 2d 317 (1979). And the evidence must be viewed in the light most favorable to the State. State v. Hill, 268 S.C. 390, 234 S.E. 2d 219 (1977), cert. denied, 434 U.S. 870, 98 S. Ct. 211, 54 L. Ed. 2d 147 (1977). Any evidence direct or circumstantial reasonably tending to prove the guilt of the accused creates a jury issue. State v. Hill, supra.

Respondent contends that the standard set forth in State v. Hill, and enunciated by the South Carolina Supreme Court in the instant case, is precisely equivalent to the standard required by this Court in Jackson. Petitioner attempts to confuse this fact by citing language from a dissent in State v. Stewart, ___ S.C. ___, ___ S.E. 2d ___ (Cp. No. 21656, filed March 3, 1982) (Ness, J., dissenting); Justice Ness having written the opinion in the instant case. There, Justice Ness cited the "any evidence rule" as it was stated in State v. Bailey, 253 S.C. 204, 170 S.E. 2d 376 (1969). In Bailey, that rule was stated as follows:

> In considering this question it must first be stated that if there is any evidence which tends to establish the guilt of the defendant on the charges alleged a refusal to direct a verdict of acquittal is not an error of law. (citation omitted). There is no such error unless there is a total failure of competent evidence as to the charges alleged. (citation omitted). (Emphasis added).

It is submittedly clear that the standard of review for motions for directed verdict, still couched in terms of an "any evidence rule," evolved to a higher standard prior to this Court's decision in Jackson so as to require that said evidence must reasonably tend to prove the guilt of the accused. Respondent contends that Jackson merely provides that the relevant question as to sufficiency of the evidence in a criminal case is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. Id., 443 U.S. at 319, 99 S. Ct. at ___, 61 L. Ed. 2d at 573. This standard does not require

excluding every reasonable hypothesis other than the guilt of the accused. Id., 443 U.S. at 326, 99 S. Ct. at ___, 61 L. Ed. 2d at 578.

Respondent respectfully submits that the standard of review utilized by the Court in the instant case is equivalent to that required by this Court in Jackson; being a substantially heavier standard than that required by the South Carolina Supreme Court in Bailey, supra, and cited by Justice Ness in his dissent in Stewart, supra, to demonstrate that the evidence in that case would not satisfy even that lighter standard.

Respondent respectfully submits that the South Carolina Supreme Court has fully embraced, and in fact anticipated the standard of review required by this Court in Jackson. As stated by the Court,

> The trial court found: (1) the victim received a blow to her head (serious enough to cause brain damage) prior to death; (2) the Appellant was armed with a deadly weapon; (3) the presence of semen in the victim's vaginal area; (4) physician's testimony that the semen could have come from a male of Appellant's blood type, and (5) decedent was thereafter killed. There was sufficient evidence to submit the aggravating circumstance to the jury.

Respondent respectfully submits that, whether you state the standard as requiring "any evidence direct or circumstantial reasonably tending to prove the guilt of the accused creates a jury issue" or "whether, after viewing the evidence in the light most favorable to the procecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (these standards being submittedly identical), the issue of Petitioner's guilt of the aggravating circumstance of rape was properly submitted to the jury by the trial court

whose decision was properly affirmed by the South Carolina Supreme Court.

Petitioner's contentions alleging otherwise are submittedly without merit.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

DANIEL R. McLEOD
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

BRIAN P. GIBBES
Senior Assistant Attorney General

ATTORNEYS FOR RESPONDENT.